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Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 2000

WESTSIDE QUIK SHOP, INC., et al.

Petitioners,

vs.

ROBERT M. STEWART, SR., et al.

Respondents.

On Petition for a Writ of Certiorari
To the South Carolina Supreme Court

Brief for the Respondents in Opposition

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QUESTION PRESENTED

South Carolina Act 125, which was enacted on July 1, 1999, banned video gaming and video gaming machines in the State as of July 1, 2000. The question presented is whether Act 125 caused a taking of petitioners' property for which just compensation is due under the U.S. Constitution.

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OPINION BELOW

The opinion of the South Carolina Supreme Court (Pet. App. 1A-11A) is not yet officially reported.

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on June 21, 2000. No petition for rehearing was filed.

The petition for a writ of certiorari was filed on September 19, 2000. The jurisdiction of this Court is invoked by petitioners under 28 U.S.C. § 1254(1) (*see* Pet. 1) but actually should have been invoked under 28 U.S.C. § 1257(a).

COUNTER STATEMENT OF THE CASE

In this case petitioners challenged a South Carolina statute that bans a type of gambling known as "video poker" (or "video gaming"), as well as the equipment associated with that activity. The South Carolina Supreme Court, exercising original jurisdiction, rejected petitioners' argument that the statute takes their property without just compensation and denied petitioners' request for injunctive relief. Petitioners seek review of that ruling.

1. For a short time, South Carolina legalized a type of gambling known as "video poker" (or "video gaming").[1] After

[1] Although petitioners contend that video gaming was made legal in South Carolina in 1975 by the passage of S.C. Code Ann.

video gambling gained a foothold in the state in the early 1980's, and for the next twenty years, the propriety and legality of video poker was the subject of intense debate inside the State, and generated activity in all three branches of state government. Ultimately, the State banned video poker and video poker machines as of July 1, 2000.

The twenty-year history of video poker in South Carolina began with two statutes, both of which were inserted without fanfare in the permanent provisions of the state appropriations act. In 1975, a provision was added to the state's anti-gambling laws that authorized the playing of "coin-operated nonpayout machines with a free play feature." 1975 S.C. Act No. 237, Part II, § 4 (codified at S.C. Code § 16-19-60 (Law. Co-op. 1976)). This provision was not seen at the time as inaugurating widespread gambling in the state, since the language expressly continued the ban on "any machine which disburses money to the player." However, in 1991, the South Carolina Supreme Court construed this statute to mean that, while it was illegal for a video game *machine* itself to disburse money to a player, it was not illegal for a *person* (such as an arcade owner) to disburse money to a player as "payment" for the free plays that the player had won using such a machine. *See State v. Blackmon*, 403 S.E.2d 660, 662 (S.C. 1991) (per curiam).

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§ 16-19-60 (Law. Co-op. 1976)(Pet. 3, n. 1), it was the position of law enforcement authorities well after that date that video poker machines were illegal gambling devices subject to seizure and destruction, and were gambling machines prohibited under the lottery provisions of the state constitution. In 1982, a provision was inserted in the permanent provisions of the state appropriations act that exempted the possession and operation of video game machines from the provisions of the law that made certain coin-operated slot machines illegal. *Powell v. Red Carpet Lounge*, 311 S.E.2d 719 (S.C. 1984)

In the interim, another provision was passed by the General Assembly in 1982 through the state appropriations act amending the law prohibiting slot machines. 1982 S.C. Act No. 466, Part II, § 14 (codified as amended at S.C. Code Ann. §12-21-2710 (West Supp. 1999)). This amendment expressly authorized for the first time, the operation and possession of "video games with a free play feature." Subsequently, the South Carolina Supreme Court determined that this provision, when read in conjunction with S.C. Code § 16-19-60, insulated the video poker machines from seizure and destruction. *See Powell v. Red Carpet Lounge*, 311 S.E.2d 719 (S.C. 1984) *and* n. 1, *supra*.

The 1991 *Blackmon* ruling, in combination with the earlier *Powell* decision, spawned not only a large video poker industry but also intense local debate and a series of state governmental actions related to video poker. *See Johnson v. Collins Entertainment Co., Inc.*, 199 F.3d 710, 715, 720-29 (4th Cir. 1999) (observing that "[v]ideo poker has arguably been the most hotly contested issue in South Carolina in recent years;" detailing growth of the industry after 1991; and holding the federal district court should have abstained in lawsuit removed from state court asserting federal claims resolution that was intertwined with intricate state regulatory scheme). The General Assembly considered banning video poker on a statewide basis, *see* Pet. App. 3A, but eventually enacted legislation in 1993 allowing local referenda on its legality, *see* S.C. Act No. 164, Pt. II, § 19H. This legislation, however, was struck down in 1996 as special legislation inconsistent with the state constitution. *See Martin v. Condon*, 478 S.E.2d 272 (S.C. 1996).[2]

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[2] While the South Carolina Supreme Court in *Martin* found the county-by-county referenda to be unconstitutional special legislation, the state supreme court made clear that it was not opining about "the advantages or disadvantages of the video game industry", and left open the question of how the legislature might suppress video poker in South Carolina. *See Martin*, 478 S.E.2d at 275.

In the meantime, a class action was filed against members of the video poker industry. In that action, plaintiffs argued, among other things, that video poker was prohibited by the state constitution's ban on "lotteries."[3] The South Carolina Supreme Court rejected that argument in 1998.[4] *See Johnson v. Collins Entertainment Co.*, 508 S.E.2d 575, 577-79 (S.C. 1998). The executive branch of South Carolina also got involved in the video poker controversy, as the state Department of Revenue was responsible for regulating the industry. *See, e.g.*, S.C. Code Ann. § 12-21-2798 (West Supp. 1999).

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[3] During the time video gaming existed in the state, it was under continual legal assault, particularly on the theory that the operation of video poker machines constituted an illegal lottery. However, the question was never decided definitively by the state appellate courts until the *Johnson* opinion was issued in 1998. *See Ardis v. Ward*, 467 S.E.2d 742, 745 (S.C. 1996) (trial court committed error in reaching question of whether video poker machines are a "lottery" and thus prohibited by the South Carolina Constitution); *Montjoy v. One Stop of Abbeville, Inc.* 478 S.E.2d 683, 684 (S.C. 1996) (in action brought to seek recovery of losses from playing video poker machines, trial court erred in dismissing action on grounds that video poker constituted a lottery); 1993 Op. S.C. Att'y Gen. 93-19 (distinguishing the South Carolina Supreme Court's earlier decisions in *Blackmon* and *Powell* and concluding that "a cash payoff from playing coin-operated video poker games constitutes a lottery, and thus is in violation of the South Carolina Constitution")

[4] The South Carolina Supreme Court noted in both the majority and dissenting opinions that it was the role of the state legislature "to determine whether video gambling is inimical to the public welfare and, if so, respond with appropriate legislation." *Johnson v. Collins Entertainment Co.*, 508 S.E.2d 575, 580 (C.J. Finney), 587 (J. Burnett dissenting), 589-90 (J. Toal concurring and dissenting) (S.C. 1998)

The statute that prompted the present lawsuit was enacted on July 1, 1999, as S.C. Act No. 125. One part of Act 125 provided for a statewide referendum asking voters whether video poker should continue to be allowed. If the voters answered "no," a separate part of Act 125 banned video poker as of July 1, 2000. *See* Pet. App. 4A. In October 1999, the South Carolina Supreme Court held that the part of Act 125 providing for the referendum violated the South Carolina Constitution as the unlawful delegation of legislative power. The court further held, however, that this invalid part of the Act was severable from the part of the Act that banned video poker as of July 1, 2000. *See Joytime Distrib. & Amusement Co. v. State*, 528 S.E. 2d 647 (S.C. 1999), *cert. denied*, 120 S. Ct. 1719 (2000).

The part of Act 125 that remains intact has two pertinent provisions. One provision makes it illegal to keep or operate video poker machines:

> It is unlawful for any person to keep on his premises or operate or permit to be kept on his premises or operated within this State any vending or slot machine, or any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value....

S.C. Code § 12-21-2710, as amended by 1999 S.C. Act 125, Part I, § 1 (effective July 1, 2000).

The other provision authorizes the seizure and forfeiture of illegal video poker machines:

> Any machine, board, or other device prohibited by Section 12-21-2710 must be seized by any law enforcement officer and at once taken before any magistrate of the county in which the machine, board, or device is seized who shall immediately

> examine it, and if satisfied that it is in violation of Section 12-21-2710 or any other law of this State, direct that it be immediately destroyed.

S.C. Code § 12-21-2712 (West Supp. 1999), as amended by 1999 S.C. Act 125, Part I, § 2 (effective July 1, 2000).

2. Petitioners are owners and lessees of video poker machines. They filed this action on May 25, 2000, in the South Carolina Circuit Court for the Thirteenth Judicial Circuit. In their complaint, they sought declaratory and injunctive relief against the provisions in Act 125 that ban video poker and video poker machines. They named as defendants the Chief of the State Law Enforcement Division and the State Attorney General in their official capacities (who are respondents in this Court). Petitioners' complaint asserted claims under state law as well as under 42 U.S.C. § 1983 and the U.S. Constitution, Amendments I, V, and XIV.

Since petitioners filed their complaint so close to the date on which Act 125 was to take effect, and because of the significant public interest involved, respondents asked the South Carolina Supreme Court to hear the case in its original jurisdiction. The South Carolina Supreme Court granted that request and issued a briefing schedule on June 6, 2000. *See* App. 3-4, *infra*.

Both petitioners and defendants extensively briefed not only the propriety of temporary injunctive relief but also the merits of petitioners claim that Act 125 caused a "taking" of their property without just compensation. *See* Brief in Support of [Petitioners'] Request for Declaratory and Injunctive Relief, at 1,

21-37.[5] Final briefs in the South Carolina Supreme Court were due on June 16, 2000. That court issued its opinion on June 21, 2000.

The court held that Act 125 did not take petitioners' video poker machines, their businesses, or the real property on which the businesses were located. As to the video poker machines, the court observed that this Court has rejected takings challenges to the forfeiture of personal property that has validly been classified as contraband. *See* Pet. App. 6A-8A. As to the video poker businesses, the court relied on the settled principle that just compensation is generally not required for injury to a business, as distinguished from the tangible property associated with that business. *See id.* at 8A-9A.

As to the land on which petitioners' businesses were located, the court addressed whether a taking had occurred under either the "per se" rule of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), or the framework of *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978). *See* Pet. App. 9A-10A. The court determined that petitioners "cannot tenably claim that [their land] will have absolutely no economic value if no longer used to house video gaming operations." *Id.* at 10A. In addition, the court "consider[ed] [Act 125's] economic impact, its interference with reasonable investment-backed expectations, and the character of the governmental action." *Id.* at 9A-11A. The court observed that video poker was a "highly regulated field" and that those in the field "must have been aware that the standards and conditions governing the issuance of permits could change to [their] detriment." *Id.* at 10A-11A. The

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[5] Although petitioners' complaint in the state circuit court alleged a claim under the Petition Clause of the First Amendment, they abandoned this claim in the South Carolina Supreme Court.

court also found that Act 125 "substantially advance[s] legitimate government interests in prohibiting illicit gaming." *Id.* at 10A.

The petitioners did not file a petition for rehearing with the South Carolina Supreme Court as allowed by that court's rules. *See* Rule 221, SCACR. Instead, the petitioners filed an "emergency" motion for a stay of the judgment which was denied by the South Carolina Supreme Court on June 30, 2000. *See* App. 1-2, *infra.*

Petitioners then applied to this Court for a stay pending disposition of their petition for a writ of certiorari to review the judgment of the South Carolina Supreme Court. The Chief Justice, sitting in Chambers, denied that application on July 6, 2000.

REASONS FOR DENYING THE WRIT

The decision of the South Carolina Supreme Court is correct and does not conflict with the decisions of this Court, any federal court of appeals, or any other state court of last resort. Moreover, this case does not present any issue of broad importance. Further review is therefore not warranted.

I

WELL ESTABLISHED PRINCIPLES DEFEAT PETITIONERS' CLAIM THAT ACT 125 WOULD UNCONSTITUTIONALLY TAKE THEIR VIDEO POKER MACHINES.

Petitioners renew their claim (Pet. 10-17) that South Carolina Act 125 caused a taking of their video poker machines without just compensation. The court below correctly rejected that claim, applying well settled precedent of this Court.

This Court has repeatedly rejected constitutional challenges to the government's forfeiture of property that has been used to commit a crime. *See, e.g., Bennis v. Michigan*, 516 U.S. 442, 452 (1996) (rejecting takings challenge); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-90 (1974) (rejecting takings challenge); *see also Van Oster v. Kansas*, 272 U.S. 465, 467-68 (1926) (rejecting due process challenge); *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 511 (1921) (rejecting due process challenge). That precedent makes it clear that South Carolina could authorize the forfeiture of video poker machines as a "secondary defense" to its ban on video poker. *See Bennis*, 516 U.S. at 452 (quoting *Van Oster*, 272 U.S. at 467-68).

In two ways, petitioners' taking claim is much weaker than the claims that this Court has rejected. First, petitioners

could have easily avoided the forfeiture of their machines by selling them during the year before Act 125 took effect. *See Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146 (1919) (rejecting wartime restriction on domestic sale of liquor that had delayed effective date, which gave distilleries seven months to sell their liquor without restrictions). Second, petitioners' video poker machines were "pure contraband" – "objects the possession of which, without more, constitutes a crime." *Bennis*, 516 U.S. at 459 (Stevens, J., dissenting). Indeed, these gambling devices fall squarely within the types of property that have traditionally been classified as contraband subject to forfeiture. *See, e.g., Lawton v. Steele*, 152 U.S. 133, 136, 142 (1894) (treating "articles used for gambling purposes" as traditionally within a state's power to forfeit).

Thus, contrary to petitioners' contention (Pet. 10-11), this case provides no occasion for this Court to decide how far a State can go in forfeiting property without just compensation. This case does not involve an owner who had no reasonable way to avoid the forfeiture. *Cf. Bennis*, 516 U.S. at 449-54 (rejecting taking claim of owner who claimed to have no knowledge of, or involvement in, illegal conduct that caused the forfeiture). It does not involve a type of property whose connection with illegal activity is in any way tenuous. *Cf. United States v. James Daniel Good Real Property*, 510 U.S. 43, 81, 83 (1993) (Thomas, J., concurring in part and dissenting in party). It involves a routine application of this Court's well established precedent.

II

THE COURT BELOW PROPERLY CONSIDERED AND APPLIED THE "PER SE" TEST OF *LUCAS*.

Petitioners contend that, in rejecting their claim that their land was taken by South Carolina Act 125, the court below "ignore[d] th[e] per se test" of *Lucas v. South Carolina Coastal*

Council, 505 U.S. 1003 (1992). Pet. 17. That contention is incorrect.

As the South Carolina Supreme Court recognized, petitioners' "per se" taking claim failed because they could not "tenably claim" that their land would have "absolutely no economic value if no longer used to house video gaming operations." Pet. App. 10A. Indeed, petitioners carefully stopped short of alleging that Act 125 would deprive any of their tangible property of all economically viable use. Thus, petitioners did not properly assert a "per se" taking in the court below, and the court below correctly determined that they could not plausibly do so.[6]

The court below also "consider[ed] [Act 125's] economic impact, its interference with reasonable investment-backed expectations, and the character of the governmental action." *Id.* at 10A (citing *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998)). The court properly assessed the reasonableness of petitioners' expectations in light of the "heavily regulated" nature of the field in which they operated. Pet. App. 10A. In addition, the court considered the extent to which Act 125 furthered the governmental interest in prohibiting illegal gaming. *Id.*

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[6] In our opening brief for the court below, we observed that petitioners "do not assert that Act 125 deprives any of their tangible property of *all* its value." Petitioners'/Defendants' Brief, *Westside Quik Shop, Inc. v. Stewart*, No. 25158, at 18 (filed June 12, 2000). We supported our observation with extensive citations to the complaint and accompanying affidavits that petitioners filed in the state circuit court. *See id.* at 17-18 & 18 n. 3. Significantly, petitioners did not dispute our observation in their reply brief for the court below. *See* Respondents' Reply Brief, *Westside Quik Shop v. Stewart*, No. 25158 (filed June 16, 2000). Petitioners' failure adequately to assert a per se taking furnishes an additional reason why further review would not be appropriate.

Petitioners fasten on solitary dictum in the opinion below, but that dictum does not warrant review of the judgment below. *See* Pet. 18. The court below said, "[E]ven where he is deprived of all economically viable use of his property, an owner must still have reasonable investment-backed expectations to establish a taking." Pet. App. 10A. That statement was not necessary to the judgment, since the court had already determined that petitioners had not been deprived of all economically viable use of their property. *See* Pet. App. 9A-10A. Because "[t]his Court reviews judgments, not statements in opinions," *Johnson v. DeGrandy*, 512 U.S. 997, 1003 n.5 (1994) (internal quotation marks omitted), the dictum cited by petitioners does not warrant further review.

In any event, the lower court's statement is consistent with this Court's precedent. In *Ruckelshaus v. Monsanto Co*, 467 U.S. 986 (1984), the Court held that the EPA's disclosure of a company's proprietary data could not constitute a taking because the company "had no reasonable, investment-backed expectation that its information would remain inviolate in the hands of EPA." *Id.* at 1008. Thus, the Court found the company's lack of reasonable investment-backed expectations to be fatal to its taking claim. The Court nonetheless acknowledged that public disclosure of the company's data could completely "destroy" its "economic value." *Id.* at 1012. *Monsanto* establishes that the lack of reasonable, investment-backed expectations may defeat a takings challenge to a government regulation that destroys the value of property.

Monsanto is, in turn, consistent with *Lucas*. The Court in *Monsanto* determined that the company could not reasonably expect EPA not to disclose the information that the company had submitted to EPA because of the laws in effect at the time of the development and submission of the data. *See id.* at 1006, 1008-10. The Court in *Lucas* likewise recognized that "existing rules or understandings" are relevant to takings analysis. *Lucas*, 505 U.S. at 1030 (citation and internal quotation marks omitted).

Of course, petitioners dispute the lower court's determination in this case that they lacked any reasonable expectation of continuing their video poker operations. *See* Pet. 20-21 n.9. That case-specific determination, however, was correct and does not warrant further review.

III

THIS CASE DOES NOT PRESENT ANY COMPELLING REASON TO GRANT A PETITION FOR WRIT OF CERTIORARI.

A. *There is no important federal question decided below that conflicts with relevant decisions of this Court, a United States Court of Appeals, or another state court of last resort.*

As discussed above, the decision below does not conflict with *Lucas* or any other decision of this Court. For that reason, this case is not an appropriate vehicle for resolution of the "conflict among state courts and among the courts of appeals" that, according to petitioners (Pet. 10), exists with respect to the nature of the *Lucas* per se rule. Moreover, petitioners do not establish the existence of any conflict between the decision below, on the one hand, and those of any lower federal court or other state court of last resort, on the other hand, that would warrant this Court's review.

This Court recently declined further review in what petitioners call (*id.*) the "leading case" in conflict with *Lucas*. *See Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999), *cert. denied*, 120 S. Ct. 1544 (2000). *Good* is consistent with this Court's precedent for the reasons discussed in the United States' brief in opposition to the petition for certiorari in that case. *See* Brief for the United States in Opposition, *Good v. United States*, No. 99-881, at 15-19.

In any event, the aspect of *Good* upon which petitioners rely is the subject of continuing developments within the Federal Circuit. *See Palm Beach Assocs. v. United States*, 208 F.3d 1374, 1379 n.3 (Fed. Cir. 2000). Review by this Court of any asserted conflict predicated upon *Good* would therefore be premature at this time.

Petitioners' reliance (Pet. 22) on another case in which this Court recently declined further review is likewise misplaced. In *District Intown Properties Ltd. v. District of Columbia*, 198 F.3d 874, 882-83 (D.C. Cir. 1999), *cert. denied*, 68 U.S.L.W. 3670 (Oct. 2, 2000) (No. 99-1663), the court held that the challenged restriction did not cause a per se taking under *Lucas* because it did not deprive the plaintiff's property of all economically viable use. Thus, the judgment in that case rested on a fact-specific application of the *Lucas* rule.

The present case does not present any of the issues as to which this Court recently granted review in *Palazzolo v. Rhode Island*, 746 A.2d 707, 714-16 (R.I. 2000), *cert. granted*, 69 U.S.L.W. 3002 (Oct. 10, 2000) (No. 99-2047). *Palazzolo* presents three questions, according to the petitioner in that case:

> (1) Whether a regulatory takings claim is *categorically barred* whenever the enactment of the regulation predates the claimant's acquisition of the property.
>
> (2) Where a land-use agency has authoritatively denied a particular use of property and the owner alleges that such denial per se constitutes a regulatory taking, whether the owner must file additional applications seeking permission for *"less ambitious uses"* in order to ripen the takings claim.

> (3) Whether the remaining permissible uses of regulated property are *economically viable* merely because the property retains a value greater than zero.

Petition for Writ of Certiorari, *Palazzolo v. Rhode Island*, *supra*, at i. Those questions are wholly distinct from the questions that petitioners in this case seek to present. *See* Pet. i.

Finally, in *Colorado Dep't of Health v. The Mill*, 887 P.2d 993, 1002 (Colo. 1995), *cert. denied*, 515 U.S. 1159 (1995), cited in Pet. 22, the court held that the challenged regulation merely implemented restrictions on land use that inhered in the plaintiff's title under the Colorado common law of nuisance. That holding is consistent with this Court's recognition in *Lucas*, 505 U.S. at 1028-31, that a regulation does not cause a taking if it merely enforces legal restrictions that existed when the owner acquired the property.

B. *There was no departure in the court below from the accepted and usual course of judicial proceedings.*

The South Carolina Supreme Court determined on October 14, 1999, in *Joytime Distrib. & Amusement Co. v. State*, 528 S.E. 2d 647 (S.C. 1999), *cert. denied*, 120 S.Ct. 1719 (2000) that the ban on the possession and operation of video gaming machines in South Carolina would become effective on July 1, 2000. Nonetheless, Petitioners waited until May 25, 2000, more than seven months after the *Joytime* decision, and less than six weeks before the impending ban was to go into effect, before filing this action. *See* Pet. App. 5A.

Petitioner's contention that this case was in some way decided in the court below "without any hearing or any notice to petitioners that the merits of the lawsuit were to be decided" (Pet.

7) is totally without merit. Since injunctive relief was requested in petitioners' complaint, an expedited briefing schedule was required by necessity, and within a time frame compelled by the petitioners own delay in bringing this case, if a timely decision was to be made by the S.C. Supreme Court before July 1, 2000.[7]

When the court below decided to take this case in its original jurisdiction "because of the great public interest in finally determining this matter" (Pet. App. 2A), the South Carolina Supreme Court made it clear that all questions of law raised in the proceeding should be fully briefed. The lower court afforded each party an opportunity to file reply briefs. *See* App. 3-4, *infra*. All of the issues, including those on the merits, were, without question, extensively briefed. Pet. App. 2A. Given the exigencies of the case, created by the petitioners delaying the filing of this lawsuit until the eleventh hour, the parties' arguments on the merits were fully considered and properly decided by the court below.

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[7] In our petition to the South Carolina Supreme Court for extraordinary relief including removal and original jurisdiction, we reserved the right to file responsive pleadings if necessary. But we further asserted in our initial petition that the case presented by the complaint was "completely lacking in merit" and that no factual inquiry appeared necessary. Petitioners'/Defendants' Petition for Extraordinary Relief Including Removal and Original Jurisdiction, *Westside Quik Shop, Inc. v. Stewart*, No. 25158, at 2, 4-6 (filed May 26, 2000). As noted in South Carolina Appellate Court Rule 229 governing the procedures for cases entertained in the lower court's original jurisdiction, the South Carolina Supreme Court "may provide for discovery, fact finding and/or a briefing schedule." The court below *a fortiori* determined that a briefing schedule provided the most expeditious means of deciding the case, treating respondents' petition in the same fashion as a motion to dismiss, making any fact finding unnecessary.

C. *Petitioners failed to ask the court below for rehearing, a factor which may be considered by this Court in exercising its judicial discretion.*

To the extent that petitioners now assert that the lower court's decision is erroneous, petitioners failed to present those contentions to the lower court in accordance with South Carolina Appellate Court Rule 221 which requires that a petition for rehearing state "with particularity the points supposed to have been overlooked or misapprehended by the court." Rule 221, SCACR. From the lower court's perspective, the filing of an "emergency" motion for stay of the lower court's judgment, that is not provided for under the South Carolina Appellate Court Rules, did not supplant the need for filing a petition for rehearing, particularly when the lower court specifically instructed the parties that any petition for rehearing had to be received by June 26, 2000. *See* App. 1-2, *infra*.

All of these factors, including the petitioners' failure to avail themselves of appellate procedures for rehearing in the court below, may be considered by this Court in determining whether it is advisable to exercise jurisdiction. "The presence of jurisdiction upon petition for writ of certiorari does not, of course, determine the exercise of that jurisdiction, for the issuance of the writ is discretionary." *Hammerstein v. Superior Court of California*, 341 U.S. 491, 492 (1951).

CONCLUSION

In the final analysis, petitioners assert that the South Carolina Supreme Court misapplied the rule of law with regard to their various takings claims. However, the South Carolina Supreme Court properly stated and applied the well settled precedent of this Court in disposing of each of petitioners' takings claims. As stated in the Rules of this Court, "[A] petition is rarely granted when the asserted error consists of ... the

misapplication of a properly stated rule of law." Sup. Ct. R. 10. It is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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October 19, 2000

APPENDIX

THE SUPREME COURT OF
SOUTH CAROLINA

Westside Quik Shop, Inc.,
Phelix C. Byrd, Ree M. Byrd, and
Winner's Pot of Gold Hot Spot,
Inc.,

Respondents,

v.

Robert M. Stewart, Sr., in his
official capacity as Chief of the
State Law Enforcement Division;
Charles M. Condon, in his official
capacity as Attorney General for the
State of South Carolina,

Petitioners.

ORDER

This Court, in our original jurisdiction, denied respondents' request for injunctive relief in this matter. Westside Quick Shop, Inc. v. Stewart, Op. No. 25158 (S.C. Sup. Ct. filed June 21, 2000 (Shearouse Adv. Sh. # 26 at 33). We instructed the parties that any petition for rehearing had to be received by the Court by June 26, 2000; however, respondents did not seek rehearing of the decision.

Respondents now ask this Court for an emergency stay of the decision pending review of this matter by the United States Supreme Court. Because respondents failed to seek rehearing, the issues decided in the case would not be preserved for review by the United States Supreme Court. Further, we do not believe that

there is a reasonable probability that four members of the United States Supreme Court would vote to grant certiorari. Accordingly, the motion for stay is denied.

IT IS SO ORDERED.

Columbia, South Carolina, June 30, 2000

* * *

THE SUPREME COURT OF
SOUTH CAROLINA

Westside Quik Shop, Inc.,
Phelix C. Byrd, Ree M. Byrd, and
Winner's Pot of Gold Hot Spot,
Inc., Respondents,

v.

Robert M. Stewart, Sr., in his
official capacity as Chief of the
State Law Enforcement Division;
Charles M. Condon, in his official
capacity as Attorney General for the
State of South Carolina, Petitioners.

ORDER

Petitioners ask to remove this matter from the circuit court for this Court to hear it in our original jurisdiction and for an expedited briefing schedule. Respondents oppose the petition.

The requests are granted. Pursuant to Rule 229, SCACR, the parties shall serve and file briefs addressing the questions of law involved in this matter and copies of the items they seek to have included in the record by June 12, 2000. Thereafter, the parties may file any objections to the items the other parties seek to include in the record and may serve and file reply briefs by June 16, 2000. All materials shall be served on the opposing parties and filed with the Clerk of Court no later than 5:00 p.m. on the due date.

IT IS SO ORDERED.

Columbia, South Carolina, June 6, 2000

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